No. 327

SEP 12 194
CHARLES ELMORE CR

Supreme Court of the United States

TERM, A. D. 1949.

ANTHONY GUSSIE

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY AND BRIEF IN SUPPORT OF PETITION.

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PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioner, Anthony Gussie, a railroad freight brakeman, respectfully petitions this Honorable Court for a writ of certiorari to the Appellate Division of the Superior Court of New Jersey.

Statement of the Matter Involved.

But one issue is presented to this Court—does the Federal Employers' Act cease to apply to a railroad freight brakeman who in the course of his employment is required to perform services over navigable waters and suffers personal injury?

There is no question as to Gussie being a railroad freight brakeman, nor as to his injury in the course of his

employment, nor that he was engaged in interstate commerce.

The petitioner, Anthony Gussie, on September 6, 1944, was a freight brakeman in the employ of respondent, and a member of a train crew assisting in the unloading of cars from a carfloat which was lying in the navigable waters of the Hudson River. He was injured in the course of his employment. The car-float was over 450 tons in weight.

The petitioner brought an action in the Hudson County Court against respondent basing his claim upon the provisions of the Employers' Liability Act and the Safety Appliances and Equipment Act. Upon motion of respondent to dismiss, the Hudson County Court dismissed the cause holding that the Longshoremen's and Harbor Workers' Compensation Act was applicable and affords to the petitioner an exclusive remedy (R. 6a-7a).

On appeal by petitioner, the Superior Court of New Jersey, Appellate Division by Mandate on Affirmance entered February 25, 1949, sustained the dismissal (Opinion R. 9a-12a).

Petitioner thereupon applied to the Supreme Court of New Jersey for certification, which petition was dismissed (R. 15a).

The dismissal of the petition for certification is a final judgment and denies petitioner any rights to relief under the Federal Employers' Liability Act. A railroad freight brakeman's right to proceed under the Federal Employers' Liability Act has always been fully recognized by the courts but relief was denied to the petitioner on the ground that jurisdiction does not extend to injuries sustained over navigable waters. The right to proceed under the Federal Employers' Liability Act is the only issue presented by this petition.

This Court Has Jurisdiction.

This case involves "an important question of federal law, which has not been, but should be, settled by this Court" (Supreme Court Rule 38, par. (5 a)). This Court should decide that a railroad freight brakeman injured on navigable waters "by reason of any defect or insufficiency, due to its (i.e. common carrier) negligence, in its cars, engines • • • boats, wharves, or other equipment • • • shall be considered as entitled to the benefits of this Chapter" (45 U. S. C. 51). It is true that there is a decision by this Court limiting the relief of railroad workers, who at the time of injury, were working in navigable waters, to remedies under the Longshoremen's and Harbor Workers' Compensation Act. *Noguiera* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 74 L. Ed. 754, 50 S. Ct. 303. It is further true that the rulings there made were applied in *Buren* v. *Southern Pac. Co.*, 50 F. 2d 407, certiorari denied 284 U. S. 638, 76 L. Ed. 543, 52 S. Ct. 20; and *Richardson* v. *Central R. Co. of New Jersey*, 233 App. Div. 603, 253 N. Y. S. 789. It is because of these decisions that the Superior Court of New Jersey, Appellate Division, stated in the present case that because it was dealing with the meaning and application of a federal statute, the Supreme Court's construction in the *Noguiera* case was binding upon it.

Statements heretofore made by this court and by inferior federal and state courts are not controlling. The Court is here faced with a situation similar to that in *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 63 S. Ct. 488, where it determined that the right of recovery is given by the Jones Act to injured seamen as such and that jurisdiction depended not on the place where the injury is inflicted but on the nature of the service and its relationship to operation of vessel in navigable waters.

There is a final judgment by the highest court of the State of New Jersey. There is a final denial of remedy under the Employers' Liability Act, and this is the only issue here presented.

The Question Presented.

Congress has power and has exercised the power to authorize the maintenance of an action for damages at law by "any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce", wherever the course of his employment may lead him.

Reasons Relied Upon for Allowance of Writ.

(1) The intent of the act of Congress was to apply the Employers' Liability Act to injuries to railroad employees, engaged in interstate commerce, irrespective of the place where the injury may have been incurred.

(2) So to construe the act does not transcend the power of Congress which may be necessary and proper for carrying into execution the judicial power with respect to liability "in damages to any person suffering injury while he is employed by such carrier in such commerce." In the present case it is clear by the wording of the statute that all employees injured in the course of employment come within the jurisdiction of the act.

(3) There is nothing in the Employers' Liability Act to indicate that its words "while he is employed by such carrier in such commerce" do not mean what they say or that they were intended to be restricted to injuries occurring on dry land.

(4) This case presents a question of importance which in the public interest should be decided by this Court to settle the important principle of law concerning the interpretation of the Employers' Liability Act.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Appellate Division of the Superior Court of New Jersey, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings, of the said Appellate Division of the Superior Court of New Jersey had in the case, *Anthony Gussie,* Plaintiff-Petitioner vs. *Pennsylvania Railroad Company,* a corporation, Defendant-Respondent, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States, and that the judgment herein of the Appellate Division of the Superior Court of New Jersey be reversed by the court, and for such further relief as to this court may seem proper.

Dated: September 8th, 1949.

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SAMUEL M. COLE,
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Of Counsel.

Supreme Court of the United States

TERM, A. D. 1949.

ANTHONY GUSSIE,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
a Corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion Below.

The opinion of the New Jersey Supreme Court is not yet officially reported. It is printed in the record (R. 15). The opinion of the Appellate Division of the Superior Court of New Jersey is reported in 1 N. J. Super. 293, 64 A. 2d 244. This opinion is also printed in full in the record (R. 9a-12a).

Jurisdiction.

The jurisdiction of the court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. A. 344). The Appellate Division of the Superior Court of New Jersey has in this case "decided an important question of federal law which has not been, but should be, settled by this Court" (Supreme Court Rule 38 (5) (a)).

The Supreme Court of New Jersey dismissed the petition for certification on June 13, 1949 (R. 15a).

Statement of the Case.

There are no controverted issues of facts in this case. The agreed statement in lieu of record (R. 1a-3a) discloses that petitioner, a railroad freight brakeman, in interstate commerce, was injured while on top of a box car on the track of a car-float which was lying in the navigable waters of the Hudson River. His suit against his employer was based upon the provisions of the Employers' Liability Act and the respondent moved to dismiss his complaint, claiming that his rights were controlled solely and exclusively by the Longshoremen's and Harbor Workers' Compensation Act. This position was sustained by the courts below (R. 4a-6a, 9a-12a, 15a).

There is no doubt (1) that Gussie was a railroad freight brakeman; (2) that at the time of his injury, he was in the course of his employment; (3) that at the time of the injury he was performing services as a railroad freight brakeman, under orders of his superiors which he was under a duty to obey; (4) that his duties, and his specific employment at the time of the injury were in interstate commerce. The only issue is that as to whether the Employers' Liability Act limited its application to injuries on dry land, although the act is in terms applicable to all injuries due to the carrier's negligence "in its cars, engines • • • works, boats, wharves or other equipment" "while he is employed by such carrier in such commerce," and although the act extends to "any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; • • • and shall be considered as entitled to the benefits of this chapter" (45 U. S. C. 51).

Your petitioner takes the position that the Employers' Liability Act in terms applies to railroad employees both on water and on land, while engaged in the course of their employment; that so to construe it avoids serious confusion as to facts in many cases, and as to the nature of the remedy.

Errors Relied Upon.

The Appellate Division of the New Jersey Superior Court erred in holding that the Employers' Liability Act applies only to injuries incurred on dry land; and it further erred in declining to consider the argument that the application of the Act to injuries incurred over navigable waters is within the purview of the Act.

ARGUMENT.

I.

The Employers' Liability Act gives a remedy to any railroad employee "while he is employed by such carrier in such commerce" without any restriction as to where the injury occurred.

Section 1 of the Employers' Liability Act, as amended August 11, 1939, provides as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative,

for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, *boats, wharves, or other equipment.*

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

This statute provides that every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier in interstate commerce. The scope of that act was extended by the 1939 amendment to include any employee "any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce, or shall in any way directly or closely or substantially affect such commerce", and it is admitted by the respondent that the services rendered by Gussie were services in interstate commerce.

In as clear language as possible, the act is made applicable to injuries suffered by a railroad employee "while he is employed by such carrier in such commerce." There is no limitation as in the Longshoremen's and Harbor Workers' Compensation Act which applies "only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any

dry dock)." U. S. Code Title 33, Sec. 903. If a limitation to dry land is present in the Employers' Liability Act, it must be found by judicial construction, and in such construction it must be remembered that the Act was remedial, for the benefit and protection of the employees of common carriers by railroad. Its purpose was to enlarge the protection and not to narrow it. It prohibited the interposition of certain common law defenses (Secs. 53 and 54).

The Congressional intent appears clear, although it has, to the present, been defeated by judicial construction. It contemplates an action against a common carrier by railroad due to its negligence "in its cars, engines, appliances, machinery, track, roadbed, works, *boats, wharves or other equipment.*" This phrase clearly includes injuries wherever they may occur. It includes injuries on land (track, roadbed) as well as injuries on navigable waters (boats, wharves, or other equipment). In the New York harbor a railroad freight brakeman is oft times required to perform a portion of his duties over navigable waters and he cannot refuse to perform any services over navigable waters when commanded to do so by his superiors.

Two railroad freight brakemen injured in the same transaction may have essentially different remedies. In the present case, the petitioner was injured because the locomotive, which was off the car-float and on dry land, suddenly pulled forward instead of backing up. If another railroad freight brakeman had been working on the locomotive, he could have been injured at the same time and for the same reason. In such event, if the contention of respondent is to be followed, the petitioner would be restricted to his remedies under the Longshoremens' Act, and the other railroad freight brakeman would be the beneficiary of the remedies under the Employers' Liability Act.

The purpose of the Employers' Liability Act was to give a common remedy to both, irrespective of the place of injury.

The phrase "while he is employed by such carrier in such commerce" applies the act to injuries in the course of his employment wherever incurred. Section 51 of the Act defines the beneficiary of the act as "any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce." This definition does not restrict the application of the act to injuries on land and does not preclude the application of the act to injuries on navigable waters.

The language of the Employers' Liability Act gives no support to the argument that it is limited to injuries on dry land. No such limitation is found in the statute, and, in fact, such a limitation is avoided. To read it into the statute is to engage in judicial legislation. It cannot be said that a railroad freight brakeman ceases to be one merely because he performs duties over navigable waters, in the course of his employment and under orders of his superior.

This court in the *Noguiera* case, 281 U. S. 128, *supra*, erroneously construed the act even though the Congressional intent is clear. A re-examination of the statute clearly indicates that it was enacted for the benefit of railroad employees wherever the course of their employment may take them. The opinion in the *Buren* case, 50 F. 2nd 407, and the *Richardson* case, 253 N. Y. S. 789, followed the rulings in the *Noguiera* case and have been primarily influenced thereby. A misconstruction of a statute where the Congressional intent is evident and clear should influence this court to re-examine the same, and set its ruling aside, if upon re-examination it becomes evident and clear that the previous construction of the statute was a misconception of the clear Congressional intent.

The situation in the case at bar is somewhat similar to the Court's pronouncement in the *O'Donnell* case, 318 U. S. 36, *supra*. In that case, the question for decision was whether a seaman injured on shore while in the service of his vessel is entitled to recover for his injuries in a suit brought against his employer under the Jones Act, 46 U. S. C. 688. The Court said on page 42

> "The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters."

The Court thereupon held that the seaman was entitled to recover even though the injury was sustained on shore holding that he was entitled to recover so long as he was injured "in the course of his employment."

In the case at bar, Gussie was performing the duties of a railroad freight brakeman who was injured on navigable waters while in the service of his employer and while engaged in interstate commerce. He sustained his injuries "while he is employed by such carrier in such commerce." This phrase has the same meaning as the phrase "in the course of his employment."

This Court having determined that a seaman injured "in the course of his employment" may recover under the Jones Act irrespective of the place where the injury was inflicted, be it on dry land or on navigable waters, should likewise determine that a railroad employee who is injured "while he is employed by such carrier in such commerce" may recover under the Employer's Liability Act irrespective of the place where the injury was inflicted, be it on dry

land or over navigable waters. This Court should likewise determine that the right of recovery in the Employer's Liability Act is given to the railroad employee *as such* and the jurisdiction over the suit depends *not* on the place where the injury is inflicted but on the *nature of the service and its relationship to the operation of the business of the common carrier by railroad.*

II.

The Longshoremen's and Harbor Workers' Compensation Act does not apply to railroad employees because it deprives such employees of certain basic rights given to them by the Employers' Liability Act.

The Courts below have based their judgments on the decision of this Court in the *Noguiera* case, and have stated that because of the fact that they were dealing with the meaning and application of a federal statute, this court's construction thereof is binding upon them (R. 11a).

The respondent argues that by providing in Sec. 905 of the Longshoremen's and Harbor Workers' Compensation Act (U. S. C. Title 33) that the remedies prescribed by that act shall be exclusive, Congress has declared its intention to prohibit an action—such as the case at hand—brought in a state court by a railroad freight brakeman injured in the course of his employment in interstate commerce. The respondent points to the fact that the petitioner is not left without a remedy, because, as an injured employee of the respondent, the Longshoremen's and Harbor Workers' Compensation Act affords him the right to have his claim adjudicated under conditions therein prescribed.

It is to be noted, however, that there are certain fundamental rights accorded to a suitor under both statutes. Under the Employers' Liability Act he can institute against his employer an action in negligence for damages with the *right of trial by jury*, of which action both federal and state courts have concurrent jurisdiction and as to which the statute of limitations is fixed at three years (U. S. Code Title 45, Sec. 56). By the Longshoremen's Act however, the trial, if it can be called a trial, takes place before a Deputy Commissioner, without a jury, who is the sole judge of the facts, and the statute of limitations is one year (U. S. Code Title 33, Sec. 913). In addition thereto, compensation for disability shall not exceed $25.00 per week (1944) with no payment for the first seven days unless the injury results in a disability of more than forty-nine days (Sec. 906) and payment shall be made for permanent partial disability for a percentage of the difference between his average weekly wages before and after the injury (Sec. 908 (21)). No provision is made in that statute for pain and suffering and in many instances, such as the present case, the employee can only recover for the time he lost while away from his employment and the fact that his pain persisted for a much longer period of time does not increase the award made to him and he cannot recover for partial permanent disability when his economic condition forces him to continue with employment irrespective of the fact that the pain does continue while he is working.

It is to be noted that the Employers' Liability Act was enacted in 1908; the Longshoremen's Act in 1927. If the injury to the petitioner had occurred prior to 1927, there is no doubt that the petitioner's remedies would be governed by the Employers' Liability Act.

The general purpose of the Longshoremen's Act was to provide compensation for those who could not otherwise be compensated for their injuries. The petitioner, at all times, had a remedy under the Employers' Liability Act. It was not the purpose of Congress in enacting the Longshoremen's Act to take away any of petitioner's rights and remedies by substituting for such rights and remedies inadequate relief and the loss of monies he otherwise could recover under the Employers' Liability Act. Congress, if it so intended would have either amended the Employers' Liability Act or nullified its provisions in so far as they apply to railroad employees injured in the course of their employment over navigable waters.

A restriction is read into the Employers' Liability Act although it does not in fact exist. This court cannot be expected to hold that the commerce power is more restricted as to navigation than as to transportation on land.

Conclusion.

An unnecessary and confusing situation is created both in the construction of a statute and in the remedies of the railroadman, if the railroadman engaged in duty on a train is entitled to recovery under this Act, but is denied recovery if, under orders of his superior, he performs similar duties over navigable waters when his "duties as such employee shall be the furtherance of interstate or foreign commerce." No such distinction is found in the statute. In fact, such a distinction is avoided, and to read it into the statute is to engage in judicial legislation. It cannot be said that a railroad brakeman ceases to be a railroad brakeman "while he is employed by such carrier in such commerce" when he performs duties over navigable waters and under orders from his superior.

Uniformity should be the essence of jurisdiction in cases of injury to railroad employees whose duties shall be the furtherance of interstate commerce, but for such uniformity the courts have substituted diversity and confusion.

The employee of a common carrier, and particularly, the railroad freight brakeman, will often have duties on box cars on tracks which are on dry land, as well as on box cars on tracks which are on a car-float lying in navigable waters. He will often be engaged in the two types of duties on the same day. At times, as in the present case, he will be working on top of a box car on a track of a car-float lying in navigable waters which was being pulled by a locomotive, which was off the car-float and on dry land, so that the box car might be pulled on to a track in the yard proper (R. 2a). There was no intent that he should have a different remedy, nor that there should be a material difference in the amount of possible recovery while injured in the performance of duties over navigable waters similar to those on land; or that, in case of doubt as to whether the injury was occasioned over navigable waters or on land, he should be required to make his choice, subject to the possibility that a mistake in choice may occasion a delay that will deprive him of any remedy.

The 1939 amendment to the Employers' Liability Act was intended to avoid similar uncertainty and confusion occasioned by the previous provision in that statute limiting it to injuries incurred by a railroad employee "while he is employed by such carrier in such commerce." Under the view of the court this required that the employee at time of injury be "engaged in interstate transportation or in work so closely related to it as to be practically a part of it" *Chicago & N. W. Ry. Co.* v. *Bolle*, 284 U. S. 74, 76

L. Ed. 173, 52 Sup. Ct. 59. By the amendment of 1939, the employee is not required to show that he was engaged in an interstate commerce transaction at the time of the injury, but the act applies to an employee "any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially affect such commerce" (45 U. S. C. 51).

The amendment removes the restriction on place and character of the service being rendered at the time of the injury, and it strengthens the intent which is already clear from the face of the Employers' Liability Act that it applies to all injuries incurred by a railroad employee "while he is employed by such carrier in such commerce' irrespective of place.

Respectfully submitted,

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